

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

April 3, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-1031

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

MARIO DELUCA,

Plaintiff-Appellant,

v.

**TOWN OF VERNON, and
TOWN OF VERNON
PLANNING COMMISSION,**

Defendants-Respondents.

APPEAL from an order of the circuit court for Waukesha County:
PATRICK L. SNYDER, Judge. *Affirmed.*

Before Anderson, P.J., Brown and Snyder, JJ.

PER CURIAM. Mario DeLuca appeals from a circuit court order affirming on certiorari review a decision of the Town of Vernon Planning Commission (the Commission) to deny him a conditional use permit to construct a salt storage facility on his National Avenue property. We affirm.

DeLuca operates a landscaping business in the Town of Vernon on properties located on Big Bend Drive and National Avenue. DeLuca submitted two site plans to the Commission seeking authority to build a salt storage building on the properties. After a public hearing, the Commission rejected DeLuca's applications for conditional use permits for both sites. On certiorari review, the circuit court affirmed the Commission. DeLuca appeals.¹

We review the record before the Commission, *see State ex rel. Hemker v. Huggett*, 114 Wis.2d 320, 323, 338 N.W.2d 335, 336 (Ct. App. 1983), to determine whether: (1) the Commission kept within its jurisdiction; (2) it acted according to law; (3) its action was arbitrary, oppressive or unreasonable and represented its will and not its judgment; and (4) the evidence was such that it might reasonably make the determination in question. *See State ex rel. Brookside Poultry Farms, Inc. v. Jefferson County Bd. of Adjustment*, 131 Wis.2d 101, 119-20, 388 N.W.2d 593, 600 (1986).

The National Avenue property is located within the B-3 general business district of the Town of Vernon. Section 15.01 of the Waukesha County zoning code which applies to the Town of Vernon sets forth permitted uses within the B-3 district. Section 15.01(1)(B)5 permits "[a]utomobile sales rooms, repair shops and storage yards, and garages for equipment, supplies or vehicles, but not including the storage of junked or wrecked automobile parts, or solid waste disposal sites." DeLuca contends that he does not need a conditional use permit to construct a salt storage building because the proposed use of the National Avenue site falls within the permitted uses of "storage yard" or "garage for supplies." After a public hearing, the Commission denied DeLuca's request to build a salt storage facility at the National Avenue location on the following grounds:

- (1) County mandates that a B-3 zoning is not a permitted use for salt storage shed without a public hearing.

¹ DeLuca's request for certiorari review in the circuit court was limited to the Commission's refusal to issue a conditional use permit for the National Avenue property. This opinion is similarly limited to the dispute regarding the National Avenue property.

- (2) Based on the Public Hearing opposition, the signatures on the petitions that were submitted in opposition is a great indicator that the public is opposed for whatever reason to the salt storage shed even in a B-3 zoning.
- (3) The increase of noise and traffic across from Guthrie School with 3- to 5-year-old children would be detrimental to those children.
- (4) There already are problems with erosion and drainage with the adjacent parcels.
- (5) A liability to the Town of Vernon.
- (6) Endangerment to public health, safety and welfare.

DeLuca makes two arguments on appeal. First, he argues that the Commission's decision must be set aside because it did not have jurisdiction to act on a conditional use permit which was not required in the first instance. Second, DeLuca claims that the Commission's decision was arbitrary, capricious and unreasonable.

A determination as to whether a salt storage building falls within the permitted uses under § 15.01(1)(B)5 requires construction of the ordinance. The rules governing the interpretation of ordinances and statutes are the same. *State v. Ozaukee County Bd. of Adjustment*, 152 Wis.2d 552, 559, 449 N.W.2d 47, 50 (Ct. App. 1989). The meaning of an ordinance is a question of law which we review de novo. *Id.*

The disputed section of the B-3 general business district zoning classification consists of a series of terms. DeLuca argues that terms appearing within the middle of the series permit the use of his National Avenue property for a salt storage shed. We disagree. Application of the rule of *ejusdem generis* indicates that salt storage sheds are not a permitted use under the ordinance.

Under the rule of *ejusdem generis*, where a general term such as storage yard, garage or supplies "is preceded or followed by a series of specific terms, the general term is viewed as being limited to items of the same type or nature as those specifically enumerated." *State v. Campbell*, 102 Wis.2d 243, 246, 306 N.W.2d 272, 273 (Ct. App. 1981). The rule requires that the specific terms "have a 'common element' defining the class to which the general term is to be restricted" *Id.* at 247, 306 N.W.2d at 274.

Here, the terms storage yards, garage and supplies are preceded by the term automobile and are followed by reference to "storage of junked or wrecked automobile parts" The rule of *ejusdem generis* requires interpreting the more general terms of storage yards, garages and supplies as limited to matters involving automobiles. A salt storage facility does not involve automobiles in the manner contemplated by § 15.01(1)(B)5. Because the ordinance precludes salt storage facilities in B-3 zoning areas, the Commission was within its jurisdiction in requiring a conditional use permit.

Citing *State ex rel. Skelly Oil Co. v. Common Council*, 58 Wis.2d 695, 207 N.W.2d 585 (1973), DeLuca argues that because a conditional use allows a property owner to put property to a use which the zoning ordinance expressly permits, *see id.* at 701, 207 N.W.2d at 587, the Commission was bound to consider whether DeLuca's proposed salt storage facility was similar to other uses in the B-3 district. DeLuca argues that the record is devoid of any discussion by the Commission on this question. From this, DeLuca reasons that the Commission mistakenly believed that it could arbitrarily deny him a conditional use permit.

Skelly does not stand for the proposition offered by DeLuca. In *Skelly*, the property owner sought a conditional use permit to erect a service station on property which was zoned for specified commercial uses which did not include service stations. *Id.* at 697, 207 N.W.2d at 585. The permit was denied by the plan commission. The city common council affirmed the denial. *Id.* at 698, 207 N.W.2d at 585-86. The property owner argued on certiorari review that the Board of Zoning Appeals, not the common council, should have reviewed the plan commission's refusal to issue a conditional use permit. *Id.* at 700, 207 N.W.2d at 586-87.

Our supreme court held that the Board of Zoning Appeals had exclusive authority to address conditional uses and that it was error for the common council to do so. *Id.* at 703, 207 N.W.2d at 588. *Skelly* does not stand for anything other than the procedure whereby review of a denial of a conditional use permit may be had under the then-applicable statutes. *Skelly* does not stand for the proposition that in evaluating a conditional use permit application, a planning commission must consider whether the proposed use is similar to other uses in the district.

DeLuca next argues that his conditional use permit application was accompanied by a specific site plan and other information requested by Town officials but that the Commission's reasons for denying the application did not reveal considerations of these materials and focused solely upon objections presented at the public hearing. This claim is contrary to the record. The minutes of the Commission hearing held on June 24, 1993, on DeLuca's request for a conditional use permit for the National Avenue property indicates that the Commission considered the following factors in making its determination: (1) physical inspection before construction; (2) landscaping; (3) erosion control plans; (4) storm water retention—south of parcel; (5) will it be transferable; (6) size and location of building; (7) other uses; (8) construction per town engineer; and (9) hydrogeologic report and monitoring wells. A number of these considerations were raised in the materials DeLuca submitted to the Commission.

DeLuca contends that the reasons given by the Commission for rejecting his National Avenue conditional use permit application are not supported in the record. While a conditional use is not inconsistent with other uses within a specific zoning area, "it may present special problems if allowed to develop as a matter of right. A conditional use is merely a device to permit a degree of flexibility in controlling permitted development within a zone." *Wisconsin Dep't of Transp. v. Office of Comm'r of Transp.*, 135 Wis.2d 195, 200, 400 N.W.2d 15, 17 (Ct. App. 1986) (citation omitted). Here, the Commission's reasons for denying a permit are indicative of its desire to control development within the B-3 zone.

The Commission's refusal to issue a conditional use permit due to the proximity of a school, erosion and drainage problems, and danger to public health, safety and welfare are supported in the record or by inferences which

may be drawn therefrom. The proximity of a school to the National Avenue site which would operate seven days a week and during such hours "as weather requires" necessarily raises concerns regarding public health and safety. Additionally, public opposition to the permit at proceedings held in June 1992 on DeLuca's earlier application was partially based on these concerns. Erosion, drainage and groundwater contamination problems were recognized and commented upon by engineers who reviewed the site plan and by citizens at a public hearing. The record supports the Commission's reliance upon these factors in denying DeLuca's conditional use permit application.

Finally, DeLuca argues that it was incumbent upon the Commission to fashion remedies or conditions which might address the concerns which caused it to deny DeLuca a conditional use permit. DeLuca cites no authority for this proposition. Therefore, we do not address it further. *Post v. Schwall*, 157 Wis.2d 652, 657, 460 N.W.2d 794, 796 (Ct. App. 1990).

By the Court. — Order affirmed.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.